Public Prosecutor v Chan Kit Tong Sally

SUPREME COURT (KUALA LUMPUR) — CRIMINAL REFERENCE NO 06-2-89
HASHIM YEOP A SANI CJ (MALAYA), AJAIB SINGH AND GUNN CHIT TUAN SCJJ
6 DECEMBER 1990

Criminal Law — Purchase of low cost house — Payment of under counter money — Whether this is a gratification and whether person receiving such gratification received it corruptly — Person who corruptly receives gratification need not be a public officer — Prevention of Corruption Act 1961, ss 2 & 3

In this case the complainant, one Tan Chong Hin, had booked a low cost house from Sally Development. The respondent who owned the majority of the share capital of the company told the complainant that in addition to the approved price of the house he would have to pay $15,000 as under counter money. A trap was laid and the money was paid over to the respondent in her office. She was arrested and charged under s 3(1)(i) of the Prevention of Corruption Act 1961. She was convicted in the sessions court and sentenced to one day's imprisonment and fined $6,000 or in default one year's imprisonment and ordered to pay a penalty of $15,000. On appeal to the High Court the conviction was quashed. Two questions were reserved for the determination of the Supreme Court as follows:

(a) whether in a prosecution under the Prevention of Corruption Act 1961 under counter money as the term is used in the circumstances of the case is a gratification within the meaning assigned to it under s 2 of the Prevention of Corruption Act 1961;
(b) if the answer to the above is in the affirmative then whether the person receiving such gratification in the circumstances described in the case received it corruptly.

Held, answering both questions in the affirmative:

(1) The interpretation of gratification in the Prevention of Corruption Act 1961 is wide enough to include the sum of $15,000 paid as under counter money. The person who receives the gratification need not be a public officer.

(2) In the light of the evidence in this case and having regard to the provisions of the Prevention of Corruption Act 1961, both the questions under reference should be answered in the affirmative.

(3) The conviction, sentence and penalty as ordered by the learned sessions judge are restored.

[Bahasa Malaysia summary

Di dalam kes ini pengadu yang bernama Tan Chong Hin telah menempah sebuah rumah kos rendah dari syarikat Sally Development. Responden yang memiliki majoriti modal saham syarikat itu telah memberitahu pengadu bahawa selain daripada harga yang diluluskan untuk rumah itu ia dikehendaki membayar $15,000 sebagai wang tambahan secara sulit. Suatu perangkap telah diadakan dan duit itu telah diserahkan kepada responden dipejabatnya. Ia telah ditangkap dan dituduh di bawah s 3(1)(i) Akta Pencegah Rasuah 1961. Ia telah disabitkan kesalahan itu di mahkamah sesyen dan dihukum satu hari penjara dan denda $6,000 atau jika tidak dibayar setahun penjara dan ia diperintah membayar penalti $15,000. Apabila rayuan dibuat ke Mahkamah Tinggi sabitan dan hukuman itu telah dibatalkan. Kemudiannya dua soalan telah dikemukakan untuk keputusan Mahkamah Agung iaitu:

(a) sama ada di dalam pendakwaan di bawah Akta Pencegah Rasuah 1961, wang tambahan yang diberi secara sulit itu seperti yang terdapat di dalam kes ini boleh dikatakan suapan di dalam takrif yang diberi di bawah s 2 Akta Pencegah Rasuah 1961;
(b) jika jawapannya 'Ya', sama ada orang yang menerima suapan itu di dalam keadaan kes ini telah menerimanya secara harom.

Diputuskan:

(1) Tafsiran suapan di dalam Akta Pencegah Rasuah 1961 adalah cukup luas untuk merangkumi wang $15,000 yang dibayar secara sulit. Orang yang menerima suapan itu tidak semestinya seorang pegawai awam.

(2) Daripada keterangan yang diberi di dalam kes ini dan memandang kepada peruntukan Akta Pencegah Rasuah 1961, kedua-dua soalan yang dirujukkan itu hendaklah dijawab 'Ya'.

(3) Sabitan, hukuman dan penalti seperti yang diperintahkan oleh hakim mahkamah sesyen hendaklah dipulihkan.]

Cases referred to

1 *Datuk Haji Harun bin Haji Idris* v *PP* [1977] 2 MLJ 155 (refd)
2 *Lim Kheng Kooi & Anor* v *R* [1957] MLJ 199 (refd)

Legislation referred to

Prevention of Corruption Act 1961 ss 2, 3

Reference from: Criminal Appeal No 52-108-1986 (High Court, Seremban)

Suriyadi bin Halim Omar (Deputy Public Prosecutor) (*Muhamad Shariff bin Abu Samad* with him) for the applicant.
Christopher Fernando for the respondent.

Cur Adv Vult

Ajaib Singh SCJ (delivering the judgment of the court): This is a reference under s 66 of the Courts of Judicature Act 1964. Two questions were reserved for determination:

(a) Whether in a prosecution under the Prevention of Corruption Act 1961 under counter money as the term is used in the circumstances described in the judgment in Seremban Criminal Appeal No 52-108-86 is a gratification within the meaning assigned to it under s 2 of the Prevention of Corruption Act 1961.
(b) If the answer to the above is in the affirmative then whether the person receiving such gratification in the circumstances described in the said judgment received it corruptly.

The respondent in this case was convicted in the sessions court under s 3(a)(i) of the Prevention of Corruption Act 1961 and sentenced to one day's imprisonment and fined $6,000, in default one year's imprisonment. She was also ordered to pay $15,000 as a penalty to the federal government under s 13 of the Act. The charge under which the respondent was convicted and which went up on appeal to the High Court in Seremban Criminal Appeal No 52-108-86 was as follows:

That you on 23 February 1983 at about 3.15pm at No 22 Taman Bunga Raya, Mantin in the District of Seremban in the State of Negeri Sembilan did corruptly receive for Sally Development & Realty Sdn Bhd a gratification, to wit, fifteen thousand ringgit ($15,000) from one Tan Chong Hin as an inducement to you doing something in respect of a matter proposed to take place, to wit, to confirm the booking of a double-storey low cost house to the said Tan Chong Hin and that you have thereby committed an offence punishable under s 3(a)(i) of the Prevention of Corruption Act 1961.

Section 3(a)(i) of the Prevention of Corruption Act 1961 reads as follows:

Any person who shall by himself or by or in conjunction with any other person —

(a) corruptly solicit or receive or agree to receive for himself or for any other person

any gratification as an inducement to or reward for, or otherwise on account of —

(i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years or to both.

The respondent owned 99% of the share capital of Sally Development & Realty Sdn Bhd. The complainant Tan Chong Hin had booked a low cost house from Sally Development on 2 January 1982 for the sum of $49,000 towards which he issued a cheque for $1,000 as booking fee. (The maximum price of low cost houses to be sold by Sally Development was approved and fixed by the state government at $49,000). The respondent told Tan Chong Hin that in addition to the price of the house he would have to pay $15,000 as under counter money. Tan Chong Hin did not have $15,000 to pay to the respondent as under counter money and this sum in marked notes was supplied to him by the police. On 23 February 1983 a trap was laid and after the sum of $15,000 was paid over to the respondent in her office she was arrested by police from the Anti Corruption Agency.

On appeal to the High Court the learned judge states, inter alia:

Is under counter money a gratification?

The appellant is not a 'public officer'. There is no law to prevent the appellant from selling her houses at any price, at a price higher or lower than the price she had advertised. Our trade and commerce are based on a laissez-faire concept of free enterprise unless constrained by law on the pricing, eg essential foodstuffs.

The appellant was not selling first day cover stamps like a postal clerk, who if an under counter payment or extra payment is demanded, clearly it makes it a bribe or gratification, if the postal clerk asks for $1 extra and takes this $1 over and above the price of the first day cover stamps. The appellant here was under no legal constraint, albeit the validless agreement her company had with the state government the terms of which were not binding on her, to adhere and conform to the prices she had originally advertised. If the complainant does not agree to make the under counter payment demanded by the appellant for the house booked, don't buy the house. Go elsewhere to buy one. In any event, complainant happily agreed to pay this under counter money. He only changed his mind after one year and his conduct from then on of going out of his way to teach the appellant a lesson.

This demand and receipt of under counter payment by someone who is not a public officer and in the absence of any price restriction imposed by law, is clearly devoid of any element of corruption and therefore is not a gratification under the Prevention of Corruption Act 1961. No doubt there is the element of profiteering which is not an offence under the Prevention of Corruption Act 1961. This is part and parcel of a free economy and trade. A trader or businessman like the appellant here, who is not a government officer, can sell his or her goods at any price, unless the price is controlled or restricted by law to a certain level. It is the ruling of this court that any demand and receipt of under counter money, over and above the prices already advertised, in the circumstances of this case cannot be a gratification under the Prevention of Corruption Act 1961. Maybe it is an offence if the receipt of such under counter money is not disclosed in the annual accounts, under the Income Tax Act, to evade tax.

It is common knowledge that housing developers have to entertain, have to pay some people without getting receipts to succeed in their projects and probably they have to ask for under counter payments for the sale of their houses in order to balance their accounts. Ask any solicitor who is involved in housing projects, in getting permits, licences, applications for sub-division, approval of building plans and end-financing from banks, he would be able to explain these unreceipted 'entertainments' prevalent during the housing boom and fortunately much less prevalent now.

The appeal is therefore allowed. Conviction is set aside and sentence quashed. Fine and penalty if paid, to be refunded to the appellant.

The learned judge in our view arrived at a wrong conclusion in construing the definition of gratification in the Prevention of Corruption Act 1961. The interpretation of gratification in the Act is wide enough to include the sum of $15,000 money paid as under counter money. Gratification as defined in s 2 of the Act includes, inter alia, money, fee and reward. With respect we think that the learned judge was also in error in holding that on the facts of this case the respondent did not receive the $15,000 corruptly. It is quite clear on the evidence that the respondent corruptly received gratification in the sum of $15,000 from Tan Chong Hin.

From the judgment of the learned judge on appeal it appears that he had taken a somewhat simple and casual approach in dealing with the provisions of the Prevention of Corruption Act 1961 and he thought that by virtue of the free market concept in the country the receipt of $15,000 by the respondent did not amount to gratification corruptly received under the Act. We feel

that the learned judge ought to have restricted his views and interpretation within the scope of the Act without embarking on irrelevant and extraneous matters. Developers of houses are free to sell their houses at any price they may fix but in the present case the price for low cost houses was approved and fixed by the state government at $49,000 at the relevant time. Any demand over and above this sum was contrary to the state government's decision. Any such demand solicited secretly and sought to be paid under the counter without the knowledge of the state government would certainly amount to corruption under the Prevention of Corruption Act 1961.

In his submission learned counsel for the respondent conceded question (a) in the reference and agreed that the sum of $15,000 as payment for under counter money was gratification under the provisions of the Prevention of Corruption Act 1961. However he submitted that the $15,000 gratification was not received corruptly by the respondent particularly as it was meant for her company and not for her personally. We find no merit in this submission as s 3(a)(i) clearly states that any person who corruptly receives any gratification 'for himself or for any other person' shall be guilty under the section. In the case of *Datuk Haji Harun bin Haji Idris* v *PP*[1] the accused was found guilty of corruption under the Prevention of Corruption Act 1961 although the sum of $250,000 which he had received from the Hongkong and Shanghai Banking Corporation was not for his own personal benefit but was for the funds of UMNO.

A person who corruptly receives any gratification need not be a public officer. In the case of *Lim Kheng Kooi & Anor* v *R*[2] the two accused persons who were charged for corruption and abetment of corruption respectively were private individuals and they were found guilty under s 3(b) of the earlier Prevention of Corruption Ordinance 1950. In the circumstances therefore we are of the view that the $15,000 received by the respondent as under counter money was gratification and that it was received by her corruptly under s 3(a)(i) of the Prevention of Corruption Act 1961.

In the light of the evidence in this case and on the view that we have taken of the relevant provisions of the Prevention of Corruption Act 1961 we answer both the questions under reference in the affirmative. The conviction, sentence and the penalty as ordered by the learned sessions judge are restored.

Order accordingly.

Solicitors: *Gunaretnam & Co.*

Reported by *Prof Ahmad Ibrahim*

Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 24-327 OF 1989
JAMES FOONG JC
19 NOVEMBER 1990

Companies and Corporations — Priority — Fixed charge under debenture — Sales tax due to state — Whether sales tax has priority over debenture holder — Sales Tax Act 1972, ss 23 & 70 — Government Proceedings Act 1956, s 10 — Companies Act 1965, ss 191 & 292

The plaintiffs are the receivers appointed by a financial institution under a debenture issued by a company known as Setama Sdn Bhd ('Setama'). The debenture created a first fixed charge over certain assets of Setama. Upon their appointments they gave notice to the Director General of Customs and Excise of Malaysia as required under the Sales Tax Act 1972 and took possession of the fixed assets and sold them for $1.2m. The proceeds of sale were insufficient to repay in full the total amount outstanding under the loan.

The defendants wrote to the plaintiffs stating that there is an outstanding sum of $55,226.52 due from the company under the Sales Tax Act 1972 and that the plaintiffs should pay the sum over to the defendants. The plaintiffs then applied to court seeking a declaration that they are not liable to pay the sum due as sales tax to the defendants in priority to the fixed charge created under the debenture.

Held, dismissing the plaintiffs' application:

(1) The issue is whether the sales tax ranks as a priority payment over the fixed charge of a debenture holder in the event when receivers are appointed. This would depend on the interpretation of s 70 of the Sales Tax Act 1972. Sections 191 and 292 of the Companies Act 1965 concern a floating charge and winding-up proceedings respectively and are not applicable.

(2) Section 70 of the Sales Tax Act 1972 standing on its own does not provide a priority payment for sales tax so incurred. It merely sets out the duties of the receiver. Section 23 of the Sales Tax Act 1972 provides that sales tax should be recovered by way of a civil debt. In such a case s 10 of the Government Proceedings Act 1956 applies and it gives the debt a preferential treatment over all debts or claims of every kind which shall subsequent to such date have been contracted or incurred by or become due from such person to any other person whomsoever except any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

(3) From the evidence the sales tax in this case was incurred before the appointment of the receivers. As the receivers must have been appointed due to a default, the debt due to the debenture holders can be taken as at the date of the appointment of the receivers. As such the debt was due after the sales tax was incurred.

(4) In any event the fixed charge in this case is not related to immovable property and therefore does not qualify under the exception found in s 10 of the Government Proceedings Act 1956.